

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE OFFICE OF THE STATE AUDITOR

In the Matter of Sue McKenzie,

Employee

v.

Minnesota Office of the State Auditor,

Employer

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATIONS**

The above-entitled matter was heard by Administrative Law Judge (ALJ) Richard C. Luis at 1:30 p.m. on January 23, 2001, at the Office of Administrative Hearings in Minneapolis. The record closed with the receipt of an after-filed document on January 24, 2001.

Jennifer L. Mohlenhoff, Deputy State Auditor, 525 Park Street, Suite 400, St. Paul, Minnesota 55103, appeared on behalf of the Office of the State Auditor (Employer, OSA). She was assisted by Deborah Phelps, an Office and Administrative Services Specialist 3 at the OSA. Susan McKenzie, 16840 Quinlan Lane, Shafer, MN 55074 (Employee) appeared on her own behalf, assisted by Michael Nelson, a Senior Customer Services Specialist at the Office of the Secretary of State, acting in his capacity as a Steward with Local 2829, American Federation of State, County and Municipal Employees (AFSCME) Council No. 6.

NOTICE

Notice is hereby given that, pursuant to Minn. Stat. § 14.61 the final decision of the State Auditor shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the State Auditor. Exceptions to this Report, if any, shall be filed with Judith H. Dutcher, State Auditor, 525 Park Street, Suite 400, St. Paul, MN 55103.

STATEMENT OF ISSUES

Whether it is appropriate to set off the subsequent wages of Sue McKenzie in the amount of \$829.32 to collect an overpayment of wages to her for the period from November 11, 1998 through June 30, 1999.

Based on all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The parties agree that Sue McKenzie was overpaid by \$.63 per hour (\$18.01 instead of \$17.38) between November 11, 1998 and June 30, 1999, in the total amount of \$829.32. They agree also that the overpayment occurred because of an error by human resources personnel at the OSA regarding the correct hourly wage for the Employee during that period. The disagreement lies over whether it is appropriate now for the OSA to set off Ms. McKenzie's future wages to collect the overpayment.

2. On November 11, 1998, the hourly wage paid to Sue McKenzie increased from \$17.49 to \$18.01. Pursuant to applicable collective bargaining agreements in effect at that time, her wage should have actually decreased to \$17.38 per hour. No one caught the error at that time.

3. Effective July 1, 1999, the Employee's correct hourly wage under the applicable collective bargaining agreement became \$18.01, the wage she had been paid erroneously since November 11, 1998.

4. The parties agree that the Employee has been paid at the correct hourly rate for all periods of time prior to November 11, 1998 and after June 30, 1999. She is still employed at the Office of the State Auditor.

5. Some time in March, 2000 the Office of the State Auditor was notified by the Minnesota Department of Employee Relations (DOER) that the Employee had been overpaid for a period of time when she was working "out of class", performing the job of a Word Processing Center Supervisor while still classified permanently as a Word Processing Operator 3.

6. Article 18, Section 8 of the contract between AFSCME Council No. 6 and the State of Minnesota deals with "Work Out of Class". The contract provides that the pay rate for an employee working out of class be at the "next full step" beyond the employee's "current salary". The correct "current salary" for Ms. McKenzie (that paid to a Word Processing Operator 3, by then designated as Office/Administrative Specialist Senior, with her seniority) as of November 11, 1998 was \$16.41 per hour.

7. Word Processing Center Supervisors are not represented by AFSCME – they are part of the Middle Management Association (MMA), which has its own compensation grid as part of its own contract with the State. For the time period in question, Ms. McKenzie's "current salary" of \$16.41 fell between various steps in Range 8 (the pay range for Word Processing Center Supervisors) of the MMA's compensation grid. For the period between November 11, 1998 and June 30, 1999, the correct pay for Ms. McKenzie was that for Step 9 (the "next full step"), or \$17.38 per hour.

8. On November 11, 1998, because of the spacing of the steps in Range 8 on the MMA compensation grid before and after that date, the "next full step" for one in

Ms. McKenzie's position, having a "current salary" of \$16.41, was pegged on the MMA compensation grid at \$17.49 from July 1 to November 10, 1998 and actually fell to \$17.38 for the period from November 11, 1998 through June 30, 1999. Exs. F, G.

9. On November 11, 1998, the employees covered by the MMA contract received a 3% wage increase. Ms. McKenzie was not such an employee. Rather, she was still covered by AFSCME and was working "out of class". As such, Ms. McKenzie was paid correctly at \$17.49 per hour (Range 8, Step 10 of MMA's compensation grid) between July 1 and November 10, 1998. She erroneously received a 3% raise, to \$18.01 per hour, on November 11 of that year. The raise should not have been granted, because her "current salary", pegged at \$16.41 on the AFSCME compensation grid, remained unchanged until June 30, 1999 and did not change on November 11, 1998. Since she was still subject to the terms of the AFSCME contract for purposes of determining her wage level, the proper salary for the Employee between November 11, 1998 and June 30, 1999 was \$17.38 per hour, pursuant to the "Work Out of Class" provision of the AFSCME contract. The difference of \$.63 per hour (\$18.01-\$17.38) paid between those dates accounts for the overpayment of \$829.32.

10. On July 1, 1999, the Employee was promoted to a permanent position as a Word Processing Center Supervisor. After that date, she was a member of MMA, subject to the MMA contract and paid according to the compensation grid therein. She has been paid at the correct rate of pay since then, at Range 8, Step 10 of the MMA grid.

11. In April of 1999, DOER issued a statewide personnel policy entitled PERSL No. 1354, Collection of Overpayments. Ex. I. This policy provides state agencies with a procedure for collecting overpayments from state employees, which includes the right of state agencies to set off an employee's wages in accordance with Minn. Stat. § 16D.16. The first sentence of the policy reads "Agencies must collect all overpayments."

12. The OSA notified McKenzie in writing of an overpayment in the amount of \$829.32 on May 30, 2000. She was notified also that she could repay voluntarily the overpayment at once or across several pay periods and was provided a Consent to Payroll Collection form. The May 30 Memorandum indicated that the Employee could choose the amount to be reduced from her gross pay each pay period, so long as it was no less than \$34.00 per paycheck. Ms. McKenzie did not fill out or sign the Consent to Payroll Collection form. Ex. A-1.

13. On July 20, 2000, pursuant to Policy PERSL No. 1354, the OSA notified Ms. McKenzie of its intention to set off any future earnings or severance pay she earned for the purpose of recovering the overpayment. Also pursuant to the policy, the OSA notified Ms. McKenzie that she was entitled to make a written request for a contested case hearing. The July 20 notice specified that the total overpayment was \$829.32. In response to this notice, Ms. McKenzie filed a timely appeal and this hearing process followed. Exs. B, C. None of the \$829.32 overpayment has been paid back.

14. The OSA has oversight responsibilities for the financial affairs of counties, cities and local government units throughout the state. It is the OSA's practice to recommend to the entities it audits that they collect any overpayment they have made, no matter how small. In order to be consistent with its practice of recommending to other government entities that they collect any overpayments, and in order to follow the mandatory language used in Policy PERSL No. 1354, the OSA has decided to pursue collection of the erroneous overpayment made to Ms. McKenzie.

15. Ms. McKenzie maintains that a payback to the Employer at the rate of \$34.00 per pay period, or even \$60.00 per month, would be a hardship on her. She notes also that the overpayments were the fault of the Employer, not her, and that it would be inequitable to reduce her pay (from the \$17.49 she received through November 10, 1999 to \$17.38 per hour) retroactively for the period from November 11, 1998 through June 30, 1998, which is the effect of her having to pay back \$.63 per hour for that period.

16. It is AFSCME's experience that, in similar situations, state agencies have decided not to pursue the collection of overpaid wages from employees in some cases. Policy PERSL No. 1354 notwithstanding, the collective bargaining agent maintains that the Employer (in this case State Auditor Dutcher) has it within her discretion to forgive the debt.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Any of the above Findings more properly designated as Conclusions are hereby adopted as such.

2. The Administrative Law Judge and the State Auditor have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 16D.16.

3. The Office of State Auditor gave proper notice of this hearing, and all relevant, substantive and procedural requirements have been fulfilled.

4. Sue McKenzie was overpaid in the amount of \$829.32 for the period from October 11, 1998 through June 30, 1999. Because of that overpayment, Ms. McKenzie is a "debtor" to the Office of the State Auditor in that amount within the meaning of Minn. Stat. § 16D.16.

5. Under Minn. Stat. § 16D.16, subd. 1, the OSA is a "state agency" that "may automatically deduct the amount of a debt owed to the state from any state payment due" to Ms. McKenzie. Subd. 1 provides further that "the state may deduct from the wages due or earned by a state employee to collect a debt ...". This provision applies directly to this case, since Ms. McKenzie is an employee of the Office of the State Auditor.

6. Under subd. 2 of Minn. Stat. § 16D.16, the State Auditor can exercise her discretion not to pursue collection of any or all of the amount owed by Sue McKenzie. The statute takes precedent over the language in Policy PERSL No. 1354, which mandates the collection of overpayments to state employees. Can Manufacturers Institute v. State, 289 N.W. 2d 416 (Minn. 1979).

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATIONS

IT IS RECOMMENDED that the overpayment of \$829.32 from the Office of the State Auditor to Sue McKenzie for wages during the period from November 11, 1998 through June 30, 1999 be AFFIRMED; and

IT IS RECOMMENDED FURTHER that the State Auditor exercise her discretion in deciding whether to continue pursuing the OSA's right to setoff in this matter; and

IT IS RECOMMENDED FURTHER that if the OSA proceeds to set off the future earnings of Ms. McKenzie to collect an overpayment that it negotiate with her in good faith to determine what amount of bi-weekly setoff can be applied without causing undue hardship to the Employee.

Dated this 7th day of February, 2001.

RICHARD C. LUIS
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped.

MEMORANDUM

The Employee does not contest that she was overpaid. She asks that the overpayment not be collected because the payback would cause a hardship to her, because the overpayment was totally the fault of the Employer and because it would be "inequitable" now, in effect, to drop her pay by \$.11 per hour (from \$17.49 to \$17.38 per hour) during the time period in question (November 11, 1998 through June 30, 1999).

None of the considerations urged by the Employee erase the legal conclusion that she was overpaid and that the Employer has a right to setoff in order to collect the debt caused by the overpayment, pursuant to Minn. Stat. § 16D.16. No argument has been made that an Employer who made an overpayment in error is barred from pursuing recovery of the overpayment, or that the overpayment is not a “debt” under the statute. Nor is the Employee entitled to relief from the fact that, under the AFSCME contract, her hourly pay actually should have dropped during the time in question. Her proper wage, as of November 11, 1998, became \$17.38 per hour strictly by application of the “Work Out of Class” provision of the contract during that period of time, and there has been no argument made that she was not subject to the provisions of that contract. In that connection, it is noted that Ms. McKenzie’s “current salary” of \$16.41 per hour under the AFSCME contract during that time was 6% less than what she actually should have received (\$17.38 per hour).

What is left for the State Auditor to consider is whether being consistent with what her Office recommends that other governmental units do regarding overpayments (to collect them), and being consistent with state personnel policies is outweighed by whatever negatives may result in the area of internal employee relations at the work place if overpayment is pursued further in this case. The Administrative Law Judge is in no position to assess the effect on office morale or the relationship between Ms. McKenzie and the Employer if the Employee is compelled to pay down the debt. The weighing of such variables is left to the State Auditor, and the record sheds no light on that aspect of the situation.

The last sentence of Minn. Stat. § 16D.16 subd. 2 reads: “If the Commissioner or state agency decides not to pursue the right to setoff, the debtor must be notified of that decision”. Policy PERSL No. 1354 notwithstanding, the statutory language implies that the final decision on collection is still in the State Auditor’s discretion.^[1] As noted herein and in the Recommendations above, if the State Auditor decides to pursue this matter from here, it is recommended that the debt be collected in an effort to do the least possible hardship to Ms. McKenzie. If a repayment agreement is not reached, and the Employer still is determined to collect, the garnishment statute (Minn. Stat. § 571.922) sets maximum limits, but specifies no minimum amount per check.

R.C.L.

^[1] See Can Manufacturer’s Institute, Inc. vs. State, 289 N.W. 2d 416 (Minn. 1979), which stands for the proposition that a rule adopted by an agency which is contrary to the language of a statute or to legislative intent is invalid. In this instance, the DOER policy making collection of overpayments mandatory, which is contrary to the obvious intent of the legislature that actual collection of overpaid wages be discretionary on the part of an agency, is invalid and unenforceable as against the State Auditor.